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5 Attorneys for Nugget Construction Co., Inc.,
6 and USF&G, Defendants

7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

8 UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
9 STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
10 STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
11 Handling, on its own behalf,)

12 Plaintiffs,)

13 and)

14 UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
15 d/b/a Marathon Fuel Service, and)
SHORESIDE PETROLEUM, INC., d/b/a)
16 Marathon Fuel Service, on its own)
behalf,)

17 Intervening Plaintiffs,)

18 and)

19 METCO, INC.,)

20 Intervening Plaintiff,)

21 vs.)

22 NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
23 STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

24 Defendants.)
25

No. A98-009 CIV (HRH)

NUGGET CONSTRUCTION,
INC.'S AND UNITED STATES
FIDELITY & GUARANTY
CO., INC.'S MEMORANDUM
IN OPPOSITION TO NORTH
STAR TERMINAL & STEVEDORE
CO.'S MOTION FOR SUMMARY
JUDGMENT OR DETERMINATION
OF LAW OF THE CASE AGAINST
NUGGET & USF&G ON THE BASIS
OF CONTRACT BY AGENCY

1 Pursuant to Federal Rule of Civil Procedure 56, Defendant Nugget
2 Construction, Inc. ("Nugget") respectfully submits its Opposition to
3 North Star Terminal & Stevedore Co.'s ("North Star") Motion for
4 Summary Judgment or for Determination of Law of the Case Against
5 Nugget and USF&G On the Basis of Contract by Agency. The Ninth
6 Circuit previously held that North Star may not prevail against Nugget
7 on summary judgment under the federal Miller Act. In addition, North
8 Star is not entitled to summary judgment as a matter of law under
9 Alaska state law. Accordingly, Nugget respectfully requests that the
10 Court deny North Star's motion in its entirety.

11 Introduction

12 North Star's latest motion complains that the Court should render
13 "a determination of the law of this case, due to the existence of a
14 contract by agency between Nugget and North Star, both under the
15 federal Miller Act and Alaska law." Importantly, North Star seeks
16 recovery within two separate and distinct legal frameworks. The first
17 is under the federal Miller Act, which will allow the imposition of
18 "an implied-in-fact, direct contractual relationship between [North
19 Star] and Nugget, the primary contractor, if [North Star]
20 demonstrate[s] 'subterfuge, collusion between [Nugget and Spencer
21 Rock] or circumstances indicating the interposition of [Spencer Rock
22 as a] strawm[an], presumably for the purpose of insulating [Nugget and
23 its surety company] from extensive Miller Act liability." *United*
24 *States ex rel. North Star Terminal & Stevedore Co., et al. v. Nugget*
25 *Construction, Inc., et al.*, 126 Fed. Appx. 348, 351 (9th Cir 2005).
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1 The second is under Alaska state law, under which "an agency relation
2 exists only if there has been a manifestation of the principal to the
3 agent that the agent may act on his account and consent by the agent
4 so to act." *Harris v. Keys*, 948 P.2d 460, 464 (Alaska 1997)
5 (citations omitted) (relying upon, *inter alia*, Restatement (Second) of
6 Agency § 15).

7 Significantly, the Ninth Circuit previously determined that North
8 Star may not prevail against Nugget under the federal Miller Act
9 "strawman" cause of action because there was insufficient evidence to
10 support North Star's assertion that Spencer Rock was a strawman of
11 Nugget. *See United States ex rel. North Star Terminal & Stevedore*
12 *Co., et al. v. Nugget Construction, Inc., et al.*, 126 Fed. Appx. 348,
13 351 (9th Cir 2005). North Star's current motion, which purports to set
14 forth a federal cause of action under an "agency" theory is, in fact,
15 no more than a recycled recitation of the "strawman" arguments that
16 were previously unsuccessful before the Ninth Circuit. Consequently,
17 North Star may not now have a second bite at the apple by again
18 attempting to prevail against Nugget under the Miller Act on summary
19 judgment with those very same arguments.

20 Similarly, North Star may not prevail against Nugget on summary
21 judgment under Alaska state law because this Court has previously held
22 that "[u]nder Alaska law . . . contracts entered into by an agent
23 cannot be construed as binding an undisclosed principal." *See United*
24 *States ex rel. North Star Terminal & Stevedore Co., et al. v. Nugget*

25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*
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1 Construction, Inc., et al., Slip Op. No. A98-0009-CV (filed Aug. 30,
2 2002) ("August 30, 2002 Order"), at 24, n. 38. This is the
3 established law of the case, which precludes the granting of North
4 Star's Motion. Regardless, even if it were not the law of the case,
5 Spencer Rock never became the agent of Nugget under Alaska state law,
6 and North Star has not introduced any genuine issue of material fact
7 to indicate otherwise. Consequently, because North Star is not
8 entitled so summary judgment as a matter of law that Spencer Rock
9 became an agent of Nugget under Alaska state law, North Star's motion
10 should be denied.

11 I. NORTH STAR'S MOTION FOR SUMMARY JUDGMENT UNDER THE MILLER ACT
12 MUST BE DENIED BECAUSE THE NINTH CIRCUIT HAS PREVIOUSLY
13 DETERMINED THAT NORTH STAR FAILED TO DEMONSTRATE SPENCER ROCK WAS
14 THE STRAWMAN OF NUGGET

15 On August 30, 2002, this Court granted partial summary judgment
16 to North Star, finding that:

17 Whether deeming Spencer a 'straw' party or deeming Nugget
18 as stepping into the shoes of Spencer, once Nugget took
19 over for Spencer as its own material supplier, North Star,
20 Shoreside and Metco directly supplied Nugget with labor,
21 equipment and services. Accordingly, it would be contrary
22 to the remedial purposes of the Miller Act to ignore that
23 and to deny the plaintiffs a cause of action under the Act.

24 August 30, 2002 Order at 23-24. The Ninth Circuit subsequently
25 reversed the Court's decision and remanded "for further proceedings to
determine whether Nugget (and Spencer Rock) engaged in conduct
sufficient to create a direct contractual relationship between Nugget
and appellees." *United States ex rel. North Star Terminal & Stevedore*

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1 Co., et al. v. Nugget Construction, Inc., et al., 126 Fed. Appx. 348,
2 351 (9th Cir 2005).

3 In rendering this decision, the Ninth Circuit specifically
4 considered and rejected North Star's argument that:

5 This Court should exercise its *de novo* review to uphold and
6 enlarge upon the district court's grant of summary judgment
7 to North Star by applying this alternative basis to Nugget
8 and USF&G's liability. It should particularly do so if it
9 declines to uphold the district court's application of the
10 federal "telescoping" basis for recovery in this case or
otherwise determines that application of this alternative
basis for recovery enlarges North Star's monetary recovery,
including its entitlement to attorney's fees, late charges
and/or interest.

11 Opening Brief for Appellee/Cross-Appellant North Star/North Star Ex
12 Rel., May 19, 2003 ("Opening Brief") at 34 (attached hereto as Ex. 1).
13 The "alternative basis to Nugget and USF&G's liability" to which North
14 Star referred in its Opening Brief is precisely the same theory on
15 which North Star now moves for summary judgment, namely that *Jensen v.*
16 *Alaska Valuation Service, Inc.*, 688 P.2d 161 (Alaska 1984) had been
17 misapplied by this Court and that, "under both federal law and Alaska
18 law, the *Cargill* [*i.e.*, *A. Gay Jensen Farms Co. v. Cargill, Inc.*, 309
19 N.W.2d 285 (Minn. 1981)] analysis finding the undisclosed principal
20 (Nugget) liable should be applied to this case." North Star's Motion
21 and Memorandum for Summary Judgment or for Determination of Law of the
22 Case Against Nugget and USF&G On the Basis of Contract by Agency
23 ("North Star's Motion") at 4. Indeed, if one compares North Star's
24 current motion with North Star's May 19, 2003 Opening Brief before the

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1 Ninth Circuit, one sees that North Star appears to have merely copied
2 and pasted large sections from its Opening Brief into its current
3 motion, which North Star then altered with minor changes to syntax.
4 Compare Opening Brief for Appellee/Cross-Appellant North Star/North
5 Star Ex Rel., May 19, 2003 ("Opening Brief") at 31-34 with North
6 Star's Motion at 3-6.

7 The Ninth Circuit declined to uphold the district court's
8 application of the federal telescoping basis for recovery and,
9 significantly, did not accept North Star's invitation to uphold and
10 enlarge upon the district court's granting of summary judgment in
11 favor of North Star. By doing so, the Ninth Circuit effectively
12 rejected North Star's "alternative theory" and, specifically, its
13 interpretation of *Cargill. Id.*; see *United States ex rel. North Star*
14 *Terminal & Stevedore Co., et al.*, 126 Fed. Appx. at 351.

15 Consequently, the Ninth Circuit's decision renders North Star's
16 Motion seeking summary judgment under the Miller Act entirely
17 improper. North Star failed to prevail once before on summary
18 judgment under its strawman theory under the Miller Act. North Star
19 should not now be permitted to prevail on summary judgment simply by
20 slapping an "agency" label at the head of recycled arguments that were
21 previously and unsuccessfully pressed in support its strawman-theory
22 Miller Act claims before the Ninth Circuit. Accordingly, North's
23 Star's motion for a determination of law of this case due to the
24
25

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1 existence of a contract by agency between Nugget and North Star under
2 the federal Miller Act should be denied.

3 II. NUGGET IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW
4 THAT THERE EXISTED A CONTRACT BY AGENCY BETWEEN NUGGET AND NORTH
5 STAR UNDER ALASKA STATE LAW

6 A. North Star's Motion Requests That the Court Reverse Itself
7 and Reject the Standing Law of This Case

8 The Court August 30, 2002 Order provided that: "There are no
9 facts in the record supporting the inference that Spencer acted as an
10 agent of Nugget at the time Spencer hired North Star." *See United*
11 *States ex rel. North Star Terminal & Stevedore Co., et al. v. Nugget*
12 *Construction, Inc., et al.*, Slip Op. No. A98-0009-CV (filed Aug. 30,
13 2002) ("August 30, 2002 Order"), at 5. The Court further held that,
14 "plaintiffs have not supplied, nor is the court aware of any federal
15 common law addressing the effect of an undisclosed principal," and,
16 further, that, "[u]nder Alaska law . . . contracts entered into by an
17 agent cannot be construed as binding an undisclosed principal." *Id.*
18 at 24 n. 38 (citing *Jensen v. Alaska Valuation Service, Inc.*, 688 P.2d
19 161, 165 (Alaska 1984)). The Court rendered these findings following a
20 lengthy analysis of *Cargill*, and, in particular, North Star's
21 contention that the facts of *Cargill* should be construed to impose
22 contractual liability upon Nugget by virtue of an agency relationship
23 between Nugget and Spencer Rock, despite the fact that Nugget was an
24 undisclosed principal.

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1 Undeterred by the Court's rejection of its reading of *Cargill*,
2 North Star sought reconsideration of the issue, asserting that
3 "Defendants Should Also Be Held Liable as an Undisclosed Principal,"
4 and, again, relying primarily upon *Cargill*. The Court concluded, as
5 it had once before, that "[t]he instant motion does not demonstrate
6 that there is a legal or factual error in the outcome of this case.
7 The court declines to reconsider its order of August 30, 2002, for
8 purposes of considering an alternative theory upon which the use
9 plaintiff might have prevailed." *United States ex rel. North Star*
10 *Terminal & Stevedore Co., et al. v. Nugget Construction, Inc., et al.*,
11 Slip Op. No. A98-0009-CV (filed Sept. 13, 2002), at 2.

12 To be sure, if the Court believed that North Star's
13 interpretation of *Cargill* should prevail over controlling Alaska law,
14 it would have indicated as such in the either its August 30, 2002
15 Order, or its September 13, 2002 Order denying North Star's motion for
16 reconsideration, in which the Court's attention was focused
17 exclusively upon this issue. As the Court pointed out in its August
18 30, 2002 Order, there is no controlling federal law on the issue of
19 liability of an undisclosed principal. The conspicuous absence of
20 federal law in North Star's Motion confirms this point. Moreover,
21 despite North Star's assertions to the contrary, there is absolutely
22 no reason why *Cargill*, a Minnesota state law case, should take
23 precedence over *Jensen*, which is controlling Alaska law, the latter of
24 which establishes that "contracts entered into by an agent cannot be

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1 construed as binding on an undisclosed principal." August 30, 2002
2 Order at 24 n. 38.

3 The Court's foregoing statement represents the law of the case.
4 North Star's Motion seeks a reversal of this law of the case, and its
5 attempt to style its motion as seeking relief under an "alternative
6 theory" that the Court has not yet fully considered, when, in fact,
7 the Court has twice previously passed judgment on this "alternative
8 theory," is as transparent as it is specious.

9 B. Spencer Rock Never Became The Agent of Nugget and North
10 Star Has Not Raised Any Genuine Issue of Material Fact to
11 the Contrary

12 Notwithstanding the absence of any rule of procedure that would
13 allow North Star to file its motion, which essentially seeks
14 reconsideration of the Court's September 13, 2002 Order denying North
15 Star's prior motion for reconsideration, North Star has deliberately
16 muddled the procedural waters by filing a separate motion on its
17 agency theory of recovery under Alaska state law on May 1, 2006, or
18 just two days after Nugget filed a motion seeking summary judgment on
19 this very issue.¹ As a result North Star has imposed upon the Court
20 the confusing and tedious task of addressing two motions for summary
21 judgment on the same issue at the same time. This is most clearly

22 ¹ Given the redundancy and procedural impropriety of North Star's Motion,
23 Nugget respectfully requests that, in lieu of a denial, the Court immediately
24 strike North Star's Motion in its entirety pursuant to Fed. R. Civ. P. 12(f),
25 which empowers the court to strike "any insufficient defense or any
redundant, immaterial, impertinent or scandalous matter."

1 evidenced by "North Star's Opposition and Cross-Motion to Nugget and
2 USF&G's April 28, 2006 Motion for Summary Judgment Against North
3 Star," filed just two days ago, on May 17, 2006, which recites, yet
4 again, the same arguments to which Nugget responds in the instant
5 motion, urging the Court that "the *Cargill* analysis . . . should be
6 applied to this case, both under state law and under the Miller Act."
7 North Star's Opposition and Cross-Motion to Nugget and USF&G's April
8 28, 2006 Motion for Summary Judgment Against North Star, May 17, 2006
9 at 45.

10 Rather than repeat the arguments raised in its April 28, 2006
11 Motion for Summary Judgment Against North Star, Nugget respectfully
12 directs the Court's attention to the facts and arguments stated
13 therein and, specifically, the arguments at pages 39-44, which respond
14 to the allegations in North Star's Amended Complaint regarding its
15 agency theory of recovery under Alaska state law and which Nugget
16 herein incorporates by reference.

17 In short, North Star believes that the Court's reading of *Jensen*
18 is wrong and that *Cargill* should be considered controlling law. As
19 stated previously, this would require the Court to reverse its
20 previous holding that "contracts entered into by an agent cannot be
21 construed as binding an undisclosed principal." August 30, 2002 Order
22 at 24 n. 38. North Star has not introduced any authority that was not
23 previously considered by the Court (twice) and, as such, the Court
24 should not now acquiesce to North Star's request.

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1 Even if the Court should reverse itself, which it should not,
2 and, in so doing, find that an undisclosed principal may be liable for
3 contracts entered into by its agent, the Court should nevertheless
4 deny North Star's Motion because, under Alaska law, Spencer Rock never
5 was an agent of Nugget. In Alaska, an agency relationship shall be
6 deemed to exist only upon the presence numerous and specific factual
7 conditions underlying that relationship, none of which are present in
8 the relationship between Nugget and Spencer Rock. Nugget's April 28,
9 2006 Motion for Summary Judgment Against North Star sets forth in
10 detail the facts supporting its argument that there was never an
11 agency relationship between Nugget and Spencer Rock, none of which are
12 disputed by North Star. Accordingly, Nugget is entitled to summary
13 judgment as a matter of law for the reasons set forth in its April 28,
14 2006 Motion Against North Star, and North Star's current motion should
15 be denied.

16 Conclusion

17 The Ninth Circuit previously held that North Star may not recover
18 against Nugget under the Miller Act on a "strawman" cause of action on
19 summary judgment. North Star's current motion, which requests the
20 Court to find the "existence of a contract by agency between Nugget
21 and North Star," is nothing more than a recycled and repackaged
22 presentation of its strawman arguments that the Ninth Circuit found
23 wholly unconvincing. Consequently, North Star's motion for summary
24 judgment under the federal Miller Act must be denied.

1 Similarly, the law of the case establishes that, in Alaska, a
2 contract entered into by an agent cannot be construed as binding on an
3 undisclosed principal. North Star is asking this Court, for a third
4 time, to reverse this law of the case. There is no procedural basis
5 for such a request and, as such, the Court should not entertain it.
6 Even if the Court should reverse itself and hold that, under Alaska
7 law, contracts entered into by an agent may be construed as binding as
8 an undisclosed principal, the undisputed facts establish that there
9 was never an agency relationship between Nugget and Spencer Rock.
10 Consequently, North Star is not entitled to summary judgment as a
11 matter of law that there existed a contract by agency between Nugget
12 and North Star under Alaska law.

13 Dated: May 19, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th
day of May, 2006, a true and correct
copy of the foregoing was served

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